LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
JUL 23 1954
HAROLD B. WILLEY, Clerk

No. 220.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN,

Appellant,

vs.

STANLEY J. BOWERS (SUCCESSOR TO JOHN W. PECK), TAX COMMISSIONER OF OHIO,

Appellee.

BRIEF IN REPLY TO STATEMENT IN OPPOSITION TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

ROBERT G. DAY,
Attorney for Appellant.

HOPPE, DAY & FORD,
Second National Building,
Warren, Ohio,
Of Counsel.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus 15, Ohio

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 220.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WARREN,

Appellant,

vs.

STANLEY J. BOWERS (SUCCESSOR TO JOHN W. PECK), TAX COMMISSIONER OF OHIO,

Appellee.

BRIEF IN REPLY TO STATEMENT IN OPPOSITION TO JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

In his statement in opposition to appellant's statement of jurisdiction and motion to dismiss or affirm, the appellee (hereinafter called the "Tax Commissioner") adopts by reference a similar statement filed in the case of **Society**

for Savings in the City of Cleveland v. John W. Peck, Tax Commissioner of Ohio (No. 204, October Term, 1954).

The majority opinion in the state court in **Society for Savings** (161 O. S., 122), cites and quotes from a number of decisions of this court distinguishing between the capital, or moneyed capital, or property representing capital of the corporation on the one hand and the capital stock issued by the corporation and owned by its shareholders on the other and then loses the distinction in a maze of semantics. It goes on to reverse the distinction and propound that the Ohio statutes in using the words "capital employed or the property representing it, in" or the words "the value of the property representing the capital employed by" the financial institution does not mean capital of the institution or value of property representing capital of the institution, but the capital stock held by the depositors therein. This disregards the fact that when a deposit is made in a financial institution it loses its identity as capital of the depositor and becomes capital employed by (or capital employed in) the institution; i.e., the capital of the institution itself, and in exchange therefor the depositor receives a passbook, which evidences a credit account in the amount of the deposit. Those passbook or credit accounts are taxed as deposits and are neither capital stock nor capital under the tax laws. Accordingly, the only capital employed in or by the institution is the capital of the institution and the only property representing it is the property of the institution; i.e., its real estate, bonds, notes and mortgages, furniture and fixtures and other assets. Furthermore, the majority opinion loses sight of the fact that since Society for Savings and First Federal have no outstanding capital stock or shares other than deposits, the capital taxed by these provisions or property representing it is limited to that meas-

ured by the reserves and undivided profits, which the depositors never paid in or owned and was never the capital of the depositors but which was accumulated from earnings of the institution.

The depositors have no ownership interest in the reserves, which are held for the sole purpose of meeting losses as appears (Stipulation 4) from the rules and regulations governing Federal Savings and Loan Associations:

> "Section 147.7 General reserves.—The term 'general reserves' means the aggregate amount of reserves of a Federal association established by such association for the sole purpose of meeting losses. Any amount in a reserve for bad debts which is exclusively for bad debt losses, shall be deemed to be a part of the General Reserves and to be a part of the reserve for losses provided in the Charters of Federal associations which have a Charter E or a Charter K."

and from the rules governing insurance of accounts therein (Stipulation 4)

> "Section 163.11 Setting up, designation, and purpose of Federal Insurance reserve.—Each insured institution shall set up a Federal insurance reserve account which shall be used solely for the purpose of absorbing losses. No insured institution may pay dividends from its Federal insurance reserve account. * * * The general reserves of Federal savings and loan associations operating under Charter K or Charter N are deemed to meet the requirements of this section. Any amount in a reserve for bad debts, which is exclusively for bad debt losses, shall be deemed to be a part of the Federal Insurance Reserve."

The position of the Tax Commissioner and the reasoning of the state court disregard and are directly contrary to regulations promulgated by the Federal Home Loan Bank Board for the Federal Savings and Loan system whether the statute be read as taxing capital or the property rep-

resented thereby. We quote from these regulations (Stipulation 4):

> "Section 141.3 Capital—The term 'capital' means the aggregate of the payments on savings accounts in a Federal association, plus earnings credited thereto, less lawful deductions therefrom."
>
> "Section 141.4 Savings Account—The term 'savings account' means the monetary interest of the holder thereof in the capital of a Federal association and consists of the withdrawal value of such interest."
>
> "Section 141.6 Withdrawal value—The term 'withdrawal value' means the amount paid on a savings account in a Federal association, plus earnings credited thereto, less lawful deductions therefrom."

Hence, the depositors' capital includes no part of the reserves and undivided profits, which are the measure of the property assessed herein.

The majority and dissenting opinions of the state court as well as the Tax Commissioner's statement in opposition clearly recognize that there is no specific statutory provision for recoupment or reimbursement of the institution for the taxes paid by it if they be paid in behalf of the depositors.

However, in his statement in opposition, the Tax Commissioner argues that the taxpayer has an implied right of recoupment or reimbursement, indeed a right of assessment against its depositors "to make up any losses sustained by the enterprise." This is directly contrary to the last sentence of paragraph 6 of First Federal's charter (Appellant's Exhibit No. 4) which we quote—

> "* * * All share accounts shall be nonassessable, and no holder thereof shall be responsible for any losses incurred by the association beyond the loss of the participation value of his share accounts at the time the loss is determined."

The majority opinion in the state court does not overcome the authority of **Home Savings Bank v. Des Moines**, 205 U. S., 503. That case involved a state law taxing shares of stock in banks measured by capital, surplus and undivided earnings and requiring state banks to pay the tax without providing for recovery or reimbursement from the shareholders. This court said in its opinion:

> (p. 510) "A superficial reading of the law would lead to the conclusion that the tax authorized by it is a tax upon the shares of stock. The assessment is expressed to be upon 'shares of stock of state and savings banks and loan and trust companies.' But the true interpretation of the law cannot rest upon a single phrase in it. All its parts must be considered in the manner pursued by this court in New Orleans v. Houston, 119 U. S. 265, 278, and Home Insurance Co. v. New York, 134 U. S. 594, with the view of determining the end accomplished by the taxation, and its actual and substantial purpose and effect. We must inquire whether the law really imposes a tax upon the shares of stock as the property of their owners, or merely adopts the value of those shares as the measure of valuation of the property of the corporation, and by that standard taxes that property itself."

The court held that in substantial effect the law imposed a tax upon the property of the bank itself and since that property included government bonds was void. Referring to **Weston v. Charleston**, 2 Pet., 449; **Bank of Commerce v. New York City**, 2 Black, 620, and **Bank Tax Case**, 2 Wall., 200, it said:

> (p. 515) "The case at bar cannot be distinguished in principle from these cases. In the first case the tax was on the capital stock at its actual value; in the second case on the amount of the capital stock and the surplus earnings, and in the case at bar on the shares of the stock, taking into account the capital, surplus and undivided earnings. It would be difficult for the

> most ingenious mind and the most accomplished pen to state any distinction between these three laws, except in the manner by which they all sought the same end—the taxation of the property of the bank. The slight concealment afforded by the omission of the property **eo nomine** is not sufficient to disguise the fact that in effect it is the property which is taxed. If included in that property it is discovered that there is some which is entitled by Federal right to an immunity, it is the duty of this court to see that the immunity is respected."

In the **Home Savings Bank** case, as in this, the state court had based its opinion upon the view that even though the tax was assessed against the corporation measured by the value of its capital stock without provision for reimbursement, it was equivalent in substantial effect to a tax upon the shareholders in respect of their shares because, being paid by the bank, the ultimate burden is, in effect, distributed upon the shareholders in proportion to their holdings. This court disposed of that argument by saying in part:

> (p. 519) "One other consideration only needs to be noticed. It is said that where a tax is levied upon a corporation measured by the value of the shares in it, it is equivalent in its effect to a tax (clearly valid) upon the shareholders in respect of their shares, because, being paid by the bank, the burden falls eventually upon the shareholders in proportion to their holdings. It was upon this view that the lower court rested its opinion."
>
> * * * * * * * * *
>
> (p. 520) "Moreover, it may be said that, if given the effect claimed, the consideration that the ultimate burden of the tax is distributed upon the shareholders in proportion to their holdings, would have saved the taxes condemned in the Bank of Commerce case and the Bank Tax case, and indeed all taxes assessed upon the property of corporations, and the immunity from state tax of United States bonds owned by corporations would indirectly be absolutely destroyed."

In **Farmers Bank v. Minnesota**, 232 U. S., 516, this court held that bonds (issued by a municipality in Indian Territory) exempt from taxation under the Federal Constitution may not be included as assets in ascertaining the surplus of the corporation owning them for the purpose of imposing a tax thereon. The court said (p. 528):

> "It results that the inclusion of the bonds now in question in the list of the assets of plaintiff in error, in ascertaining its surplus for the purpose of imposing a state property tax thereon, was repugnant to the Constitution of the United States."

The law involved in **Des Moines National Bank v. Fairweather**, 263 U. S., 103, 105, 44 S. Ct., 23, cited by the Supreme Court of Ohio (161 O. S., 122, 133) specifically assessed a tax on shares against the several shareholders not, as in the case at bar, against the financial institution itself. We quote (p. 105):

> "The facts may be shortly stated. No assessment was made against the bank, save of its real property."

The text of the law as quoted 263 U. S., 103 at p. 108 and 44 S. Ct., 23 at p. 25 reads:

> "Shares of stock of national banks and state and savings banks, and loan and trust companies, located in this State, shall be assessed to the individual stockholders at the place where the bank or loan and trust company is located. * * *"

The law went on to provide for payment of the tax in the first instance by the bank with ample provision for enforcing reimburement from the shareholders; it also specifically provided that except for the tax on real estate of the bank, "the property of such corporation shall be otherwise as-

sessed." In contrast with this, our statute (G. C. Section 5409) provides:

> "The real estate of a financial institution shall be taxed in the place where it is located, in like manner as the real estate of persons is taxed; but the tax provided for in this chapter shall be in lieu of all other taxes on the other property and assets of such institution."

In the case at bar, the Tax Commissioner considered and treated the taxes involved as taxes upon the property of First Federal. The captions of the tax bills (Appellant's Exhibits 5, 6, 7, 8 and 9) contained the number of the year followed by the words **"tax bill for personal property of financial institution."**

The statement of the Tax Commissioner and the interpretation set forth therein of the majority opinion of the state court assume "the complete identity of the bank and its depositors." If that is the proper construction of the holding of the state court, then it matters not whether the law is construed as imposing the tax upon the institution itself or upon the depositors on account of their so-called ownership interests therein; since the institution and its depositors are identical, the tax is imposed upon the property of the institution, including Federal securities, or upon the depositors' aliquot portions of the ownership interests therein, and the law may not be sustained but is repugnant to the Constitution and to the laws of the United States.

Respectfully submitted,

ROBERT G. DAY,
Attorney for Appellant.

HOPPE, DAY & FORD,
Second National Building,
Warren, Ohio,
Of Counsel.